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No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PRINCE GEORGE'S COUNTY, MARYLAND, *et al.*
Petitioners

v.

MARC ALEXANDER, *et al.*
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fourth Circuit err in declaring unconstitutional Prince George's County, Maryland's 1984 Affirmative Action Plan for Fire Department hiring, when it found that the Plan did not survive strict scrutiny under this Honorable Court's decisions, 1989 through 1995?

2. Did the United States Court of Appeals for the Fourth Circuit err in striking the gender-based component of Prince George's County, Maryland's 1984 Affirmative Action Plan for Fire Department hiring, once it found that the race-based component of that Plan did not survive strict scrutiny?

PARTIES TO THE PROCEEDING

The Petitioners (defendants and appellees at trial and on appeal) are:

Prince George's County, Maryland

Fire Chief M. H. Estepp (Retired), in his official and individual capacities

Lt. Col. William H. Goddard, III (Retired), in his official and individual capacities

Lt. Col. Maureen Hennessy, in her official and individual capacities

Ms. Yvonne Tyler, in her official and individual capacities

The Respondents (plaintiffs and appellants at trial and on appeal) are:

Marc Alexander

Timothy Clark

George Frye

Angela Moore

Robert Moore

Josh Reedy

Richard Saxberg

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INTRODUCTION

Prince George's County, Maryland's population of 729,268 places it as the third largest of the State of Maryland's 24 political subdivisions. The County adjoins the District of Columbia and forms two-thirds of its border. In the past quarter-century, the County has undergone an extraordinary and unprecedented shift in the demographics of its population:

Census Year	County's Civilian Labor Force	
	Minority[1]	Female
1970	16.7%	40.9%
1980	41.5%	47.4%
1990	57.5%	49.9%

Prince George's County is governed under its 1970 home-rule Charter, with its executive and legislative branches led by an elected County Executive and an elected County Council. Constitution of Maryland, Art. XI-A §§1,3; Maryland Annotated Code, Art. 25A §5; Charter of Prince George's County Maryland, Article V §§501-02. (Appendix at pp. C-2 through C-4, C-7 through C-8).

In the 1970s and early 1980s, discrimination against African Americans and women in the Prince George's County Fire Department was rampant, pervasive, self-evident, and undeniable. In 1974 the County's Firefighter complement of 290 was 2.7% minority and 0.0% female. Ten years later, in 1984, the year that the Department's Affirmative Action Plan (a part of the County-wide hiring plan) for new hires was adopted, the Firefighter force was 19% minority (virtually all, African American) and 3% female, trailing

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[1] The County's minority population is overwhelmingly African American. The 1990 Census figures establish that the County's civilian labor force was 3.5% Hispanic, 3.5% Asian, and 0.35% Native American.

unconscionably behind the population and workforce figures from the beginning of that decade.

This persistent discrimination in the Fire Department caused the United States Department of Treasury's Office of Revenue Sharing in 1981 to threaten to discontinue its federal funding to the County unless immediate corrective measures were taken.[2]

As a result of the Fire Department's Affirmative Action Plan, by September 1993 when this litigation was filed against it, the Department had swelled its Firefighter ranks to 38% minority, 15% female, 2% Hispanic, and 0.5% Asian.[3] The Department, aided immeasurably by its Plan, had developed a talented and highly professional public-safety cadre well positioned to serve its constituency, the changed and changing population of the County.

These gains in minority and female representation were not accomplished at the expense of other segments of the County population. For example, of the 72 Firefighters hired from 1990 through 1994, 36 were white males. The County has never hired a Firefighter who was not objectively rated by the Department as either Outstanding or Well-Qualified (*cf.* Qualified or Not-Qualified) under its evaluation system.

The Fire Department achieved this evolution in the years 1984-1994 by adhering strictly to the principles of lawful affirmative action laid out by this Court. The Fire Department and the sovereign government of Prince George's

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[2] The Office of Revenue Sharing required the County to enter into a Compliance Agreement later that year. After the adoption of the Department's Plan, the Office of Revenue Sharing recognized the progress which the Department had made in recruiting and hiring minorities and females, and ceased its formal monitoring efforts.

[3] By the end of calendar year 1993, there were 449 persons employed by the County in the Fire Department Protective Services category, which since 1989 had included Firefighters, Paramedics, and Emergency Medical Technicians.

County achieved a measure of success for which they are justifiably proud. States, counties, and cities in this country, facing similar sudden demographic upheavals, would do well to turn to the County and its Fire Department for guidance.

Regrettably, the United States Court of Appeals for the Fourth Circuit has found that this Affirmative Action Plan violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and henceforth may not be used in Firefighter hiring.

No affirmative action plan can weather the sort of post-hoc, hypertechnical, and wrong-headed analysis brought to bear by the Court of Appeals in this case. Perfection, as required by the panel below, is simply beyond the capacity of any government to attain, as it strives in the best of faith to meet the ephemeral, will-o'-the-wispish, "strict scrutiny" standard.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, filed September 5, 1996 (Appendix A), is reported at 95 F.3d 312. The opinion and order of the United States District Court for the District of Maryland, Southern Division, filed October 11, 1995 (Appendix B), is reported at 901 F. Supp. 986.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was filed on September 5, 1996. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND RELATED PROVISIONS INVOLVED

United States Constitution, Art. III
United States Constitution, Amendment XIV, Section 1
Constitution of Maryland, Article XI-A, Sections 1 and 3
42 U.S.C. §1981 (1870)
42 U.S.C §1983 (1871)
Maryland Annotated Code, Art. 25A, Section 5(A)(1)
Prince George's County Code §16-109 (1976)
Prince George's County Code §16-162 (1976, 1981)
Charter of Prince George's County, Maryland, Art. V (1970, as amended)
Prince George's County Government, Order of County Executive No. 15-1983, April 6, 1983

* * *

These provisions are printed in Appendix C.

STATEMENT OF THE CASE

Proceedings Below

Respondents are six white males and one white female, five of whom were not hired as Firefighters by the Fire Department of Prince George's County, Maryland in either of the Recruit Classes challenged in this litigation: the February 1993 Class (13 Recruits) and the June 1994 Class (7 Recruits).

Their Complaint was filed on September 9, 1993 and was amended twice over the following year. As amended, it alleges race and gender discrimination in violation of Section 1 of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§1981 and 1983. It seeks compensatory damages (including back pay and benefits, and retroactive seniority), punitive damages, an order requiring that Respondents be hired, injunctive and declaratory relief, and attorneys' fees and costs against Petitioners Prince George's County, Maryland, Fire Chief M. H. Estepp (now retired from

the Department), Lt. Col. William H. Goddard, III (now retired), Lt. Col. Maureen Hennessy, and Ms. Yvonne Tyler (a civilian employee of the Department).

After a year of extensive discovery, all Petitioners moved for summary judgment on December 23, 1994. Respondents filed a cross-motion for summary judgment as to liability on January 19, 1995. After oral argument before the trial court on the motions, on October 11, 1995 the District Court granted Petitioners' Motion for Summary Judgment, denied Respondents' cross-motion, and entered judgment for Petitioners. (Appendix B). Respondents noted a timely appeal to the United States Court of Appeals for the Fourth Circuit.

On September 5, 1996, a three-judge panel of the Court of Appeals affirmed in part, reversed in part, and remanded the case to the District Court for further proceedings. (Appendix A). The Court of Appeals held that (1) the Fire Department's Affirmative Action Plan was not narrowly tailored to achieve its goals because among those benefited by it were Hispanic and Asian minorities which the Department had not established in the record were the victims of past discrimination; (2) further proceedings were necessary to determine whether Mr. Reedy would have been hired in June 1994 but for the existence of the Plan; (3) the remaining six plaintiffs were not denied employment because of their race or sex and thus, were not entitled to any individual relief; and (4) reversing the finding of the District Court, the four individual defendants had not established that they are entitled to qualified immunity and thus, were subject to individual liability "because case law (about which a reasonable official would have known) had clearly established by 1993 and 1994 that the department's affirmative action program failed to satisfy the strict requirements of the Equal Protection Clause." (Appendix at pp. A-3 and A-12).

Statement of Facts

1. The Affirmative Action Plan

Prince George's County, Maryland's Affirmative Action Plan for all County hiring was adopted in conformity with Section 16-109(b) of the Prince George's County Code (Appendix at p. C-4), which required the County Executive to "establish the components of an affirmative action program for the County." In accordance with that directive, on April 6, 1983, County Executive Parris N. Glendening (the elected Governor of Maryland since 1994) issued Executive Order No. 15-1983, which instructed the County's Personnel Officer to develop, implement and monitor the County's Affirmative Action Plan. (Appendix at p. C-8).

Acting under the County Executive's Order, the Office of Personnel established hiring goals for new County employees using the 1980 Census civilian labor force statistics. The County's Affirmative Action Plan was a five-year plan, to be reviewed and renewed for another five years at the end of each June 30 fiscal year. Affirmative action goals were set by agency and County-wide. The Fire Department was directed to adopt its own Affirmative Action Plan and established its first Five-Year Affirmative Action Plan on July 17, 1984. Each year thereafter, each County agency and department including the Fire Department, in consultation with the Office of Personnel, established a percentage hiring goal for minorities and females within that agency or department.

In 1987, the Office of Personnel revised the County's Affirmative Action Plan to a "one-year plan with one-year goals" as well as long-term goals. The Fire Department's goal, a workforce that was 39% minority and 18% female, was not attained even after the hiring of the challenged 1993 and 1994 Firefighter Recruit Classes.

The creation of the Fire Department's Affirmative Action Plan was a lawful and reasoned effort to remedy the well-known race and sex discrimination in hiring and

employment practices which had existed in the Fire Department throughout its history, into the early 1980's. The record in this case establishes beyond question that (a) before, and to a lesser extent after, 1984 there was pervasive, rampant, and blatant discrimination in the Department against minority and female Firefighters, and (b) this discrimination was because of their race and sex.

Specifically, the record contains voluminous evidence of discrimination against African Americans and women, including statistical evidence of the gross underrepresentation of African Americans and women in the Department, as well as extensive and significant anecdotal evidence of discrimination: to wit, that African American Firefighters frequently were referred to as "niggers;" that African American Firefighters were subjected to racially derogatory pranks — for example, one Firefighter came into to work to find on his desk a cross inscribed with "R.I.P." and decorated with a sheet to resemble a Klansman's hood; that African American and female Firefighters received less training than their white male counterparts; that female Firefighters were physically assaulted, called names such as "bitch," "slut," and "whore," and subjected to sex-based hazing rituals. (See Appendix at pp. B-14 through B-15)

2. The Hiring Process for Firefighter Recruits

Each Respondent, and each Recruit in the challenged classes, completed the Firefighter application process, which includes a written application for employment, a written examination, and an oral interview. All applicants are placed on the Applicant Register in the order of their combined grades on the written examination and oral interview. The Applicant Register is then divided into three "eligibility bands" — Outstanding, Well Qualified, and Qualified.

Within each "band," applicants are then placed on the Applicant Register grouped by the preference, if any, to which they are entitled under the County's Personnel Law.

County Code §16-162. (Appendix at p. C-5). The statutory preferences for Firefighters, in order, are:

1) Prince George's County employees seeking promotions;

2) disabled veterans;

3) past or present volunteer firefighters who are also veterans;

4) veterans who are not disabled;

5) past or present volunteer firefighters who are not veterans;

6) displaced homemakers who are not veterans;

7) Prince George's County residents;

8) all other persons.

Applicants within the same "eligibility band" who have the same preference are listed in the order of their combined test scores. All applicants within a given "band" are considered equally qualified for hire.

Selections for the class are made first from the Outstanding "band." Assuming that the number of Recruits to be hired equals or exceeds the number of applicants in the Outstanding "band," all applicants in the Outstanding "band" are hired regardless of preference, race, or gender. Once that usually narrow "band" is exhausted, selections are made from the Well-Qualified "band." If the Well-Qualified "band" were ever to be exhausted, selections would then be made from the Qualified "band." However, since the three-tiered "band" hiring system was adopted by the Fire Department in its original 1984 Plan, no Firefighter has been hired from the Qualified "band." In selecting applicants for hire from within the Well-Qualified "band," the Fire Department considers preference status and its Affirmative Action goals.

3. The February 1993 Firefighter Recruit Class

This challenged Class had 13 members. In furtherance of the Fire Department's Affirmative Action goals, an effort was made to include males, females, and minorities. That Class was made up of 4 white males, 4 black males, 3 white females, 1 black female, and 1 Hispanic male. Of the 13 Recruits, 4 (all white males) achieved scores classifying them as Outstanding and 9 achieved scores classifying them as Well-Qualified. Of the 13 Recruits, 7 received "volunteer preference:" 2 minority males, 3 white males, and 2 white females. The 4 white males were hired because they were in the Outstanding "band," without regard to preference or affirmative action goals.

4. The June 1994 Firefighter Recruit Class

This Class, the only other class challenged, had 7 members, including Marc Alexander and Angela Moore. Ms. Moore was hired by operation of the Department's Plan and its goals. She was hired instead of one of the other Respondents. The class was made up of 3 white males, 1 black male, 2 white females, and 1 Hispanic male. Of the 7 Recruits, 1 (a white male) achieved a score classifying him as Outstanding and 6 achieved scores classifying them as Well-Qualified. Of the 7 Recruits, 2 received "volunteer preference:" a minority male and Ms. Moore, a white female. The white male, not a "volunteer," was hired because he was in the Outstanding "band," without regard to preference or affirmative action goals.

REASONS FOR GRANTING THE WRIT

This Honorable Court has granted writs of certiorari when a federal court of appeals has "misconceived" or "misapprehended" an applicable ruling of this Court (*see e.g., Wilkinson v. United States*, 365 U.S. 399, 401 (1961); *Schlude v. Commissioner*, 372 U.S. 128, 130 (1963)); where the opinion below "seemed to be out of line with the [Supreme Court] authorities" (*Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129, 130 (1959)); or where that opinion "appeared to be in conflict with . . . [Supreme Court] precedents" (*Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982)).

This Court's opinion eighteen months ago in *Adarand Constructors, Inc. v. Peña*, ___ U.S. ___, 115 S.Ct. 2097, 2113, 132 L.Ed 2d 158, 63 U.S.L.W. 4523 (1995), left no doubt that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Such classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors*, 115 S. Ct. at 2113.

In his concurring opinion in *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980), Justice Marshall concluded that for "governmental programs employing racial classifications for remedial purposes . . . conventional 'strict scrutiny' [is likely to be] . . . strict in theory, but fatal in fact." In *Adarand Constructors*, Justice O'Connor, writing for a majority of this Court, specifically laid to rest the apprehension that the strict scrutiny standard would invalidate all race-based affirmative action preferences, stating:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate

> reality, and government is not disqualified from acting in response to it.

Id. at 2117. One year later, and just a few months ago, this Court re-emphasized that "strict scrutiny . . . is not inevitably 'fatal in fact.'" *United States v. Virginia*, ____ U.S. _____, 116 S.Ct. 2264, 2276 n.6, 135 L.Ed 2d 735, 64 U.S.L.W. 4638 (1996). This Court has thus clarified, most recently while the case at bar was *sub curia* at the Court of Appeals, that there is no sweeping prohibition to be visited upon affirmative action by federal, state, and local governments. *See also Croson*, 488 U.S. at 509-11.

Although the Court of Appeals acknowledged this Court's directives in *Adarand Constructors*, it surely "misconceived" or "misapprehended" the manner by which the strict scrutiny test should have been applied in this case.

Prince George's County, Maryland's Fire Department Affirmative Action Plan was conceived and implemented to rectify past discrimination of the most pernicious sort, has been notably successful in so doing, and accomplished this through appropriate and timely governmental action which withstands constitutional attack, even when strictly scrutinized.

The Fire Department's Affirmative Action Plan Is Lawful Under 42 U.S.C. § 1983

Applicable Legal Standards

42 U.S.C. § 1983 (1871) provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law . . . .

It is axiomatic that Section 1983 provides a vehicle for one seeking redress in court for the deprivation of a right "secured by the Constitution and laws" of the United States by a "person" acting "under color of" state law. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

Respondents have alleged under § 1983 that the Fire Department's Plan deprived them of the right, secured by the Equal Protection Clause, to be free from race and gender discrimination in hiring.[4]

Strict Scrutiny Review

There are, of course, two inquiries in applying strict scrutiny review. First, the use of racial classifications must be justified by a compelling governmental interest. There must be a "strong basis in evidence for . . . [the] conclusion that remedial action . . . [is] necessary." *Croson*, 488 U.S. at 500 (*quoting Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267,

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[4] The Clause provides, in relevant part, that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Section 1.

Respondents also have attacked the Plan under 42 U.S.C. § 1981 (1870), which provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

A § 1981 plaintiff must prove that he is the victim of intentional race discrimination. *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982). Thus, the Plan withstands attack under §1981 for the reasons set forth herein with respect to §1983: the Department violated no constitutional rights of the Respondents, intentionally or inadvertently.

277 (1986)). Second, the means the government selects to effectuate its interest must be "narrowly tailored" to the achievement of that goal. *Croson*, 488 U.S. at 507. The "burden" of "demonstrat[ing] the unconstitutionality" of an affirmative action plan on equal protection grounds "remains" with the person attacking it. *Wygant*, 476 U.S. at 277-78.

The Fire Department Established That Its Plan Was Justified By A Compelling Governmental Interest

In determining whether the use of racial classifications is "justified by a compelling governmental interest," this Court has required proof of past race discrimination, including proof of statistical disparities corroborated by significant anecdotal evidence of specific instances of race discrimination. *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 338 (1977). This Court also has required proof that the plan, as drafted, has a remedial purpose —that it is targeted at the past discrimination. *Croson*, 488 U.S. at 498-500.

The Fire Department proved that its Plan was "justified by a compelling governmental interest" — namely, remedying palpable and proven past discrimination. As set forth above, the County produced a wealth of statistical and anecdotal evidence of past discrimination, including evidence of a gross underrepresentation of minorities and females within the Department, compelling evidence of repeated and ongoing instances of race- and gender-based discrimination and harassment against minority and female Firefighters, and evidence that the Office of Revenue Sharing seriously considered withdrawing federal funding from the County because of the Department's pervasive discrimination against minorities and women. The County established that the Plan was designed to remedy that past discrimination by encouraging the inclusion of well-qualified African Americans and females within the Department's ranks.

The Fire Department Established That Its Plan Was Narrowly Tailored

In determining whether a plan is narrowly tailored, this Court has suggested that five factors are relevant: "(1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) the availability of waiver provisions if the plan could not be met; and (5) the effect of the remedy upon innocent third parties." *United States v. Paradise*, 480 U.S. 149, 187 (1987) (Powell, J., concurring).

The Fire Department established that alternative remedies, such as targeted recruiting, changing the entrance examinations in 1978 so as to eliminate bias in favor of persons who had served as volunteer firefighters, implementing a minority recruitment program in 1974, and hiring a minority recruitment officer, had not worked. The Plan was limited in duration; it was reviewed annually and would terminate once Plan goals were met. The Plan was specifically designed to remedy the existing racial imbalances between the civilian labor force and the Department's workforce, which had resulted from past discrimination. The Plan was flexible, did not impose quotas, and did not require the hiring of any particular number or percentage of minorities or females at any given time. For example, in 1993, the Department hired fewer females than it wished because a suitable number of qualified female applicants could not be found. Finally, the Plan did not have a severe impact on "innocent third parties" because it imposed nothing approaching a complete ban on their hiring. Indeed, the record evidence showed that from 1990 through 1994, of the 72 Firefighters hired, exactly one-half were white males. *Supra* at p. 2. White males were a significant part of the two challenged Firefighter Recruit Classes — the February 1993 Class of 13 Recruits included 4

white males and the June 1994 Class of 7 Recruits included 3 white males. *Supra* at p. 9.

The Court of Appeals Ignored The County's Proof And Struck Down The Plan

The Court of Appeals assumed that the Fire Department Plan was "justified by a compelling interest," accepting the District Court's finding that there was ample evidence of past discrimination and that the Department's interest in redressing the present effects of this documented past discrimination within the Department was a "compelling" interest. The Court of Appeals concluded, however, that the Plan was not narrowly tailored because "the means chosen by the department are not related closely enough to the interests asserted." *Alexander v. Prince George's County, Maryland*, Appendix at p. A-8.

Significantly, the Court of Appeals accepted the District Court's findings, based upon the Department's extensive evidence, that the Plan was limited in duration, was flexible, did not impose quotas, and did not impinge inappropriately upon the rights of non-minorities. Rather, the Court isolated what it found to be two "fatal" flaws in the Plan: (1) it may benefit certain minority groups (Hispanics, Asians, and Native Americans) which had not been established in the record to be the victims of past discrimination; and (2) the Fire Department did not abandon the legislatively mandated "volunteer preference," perceived by the Court of Appeals to be a "less drastic" and a "race-neutral" route than affirmative action to accomplishing its legitimate interests.

These "flaws," if flaws they be, are not "fatal in fact" to the Fire Department's Plan under any fair reading of this Court's prior decisions. Nevertheless, the Court of Appeals has consigned the Fire Department's admirable and long-standing Affirmative Action Plan to the dustbin of history.

The Court of Appeals Erred In Requiring That The Fire Department's Plan Must Benefit Only African Americans and Women

Relying on *Croson*, the Court of Appeals concluded that the "failure to match particular racial or ethnic preferences with particular acts of discrimination against particular racial or ethnic groups" established that the Plan was not narrowly tailored. *Alexander v. Prince George's County, Maryland*, Appendix at p. A-9.

In fact, the record in this case clearly establishes that the central focus of the Fire Department's affirmative action efforts with respect to minorities has been to remedy patently apparent and established past discrimination against African Americans in the Fire Department by increasing the number of African American Firefighters. From 1990 through 1994, of those 72 new Recruits, the Fire Department hired 24 African Americans and 3 other minorities. These statistics leave no doubt that minority hiring, just as the County and the Department intended, equated by any fair analysis to African American hiring.[5]

Despite this, the Court of Appeals found that the fact that a handful of members of non-African-American minority groups may have benefited from the Plan over the years was sufficient to render it unconstitutional. That conclusion is not supported or even suggested by *Croson* or by any other decision of this Court.

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[5] Further, the Court of Appeals ignored the ample statistical evidence in the record of past discrimination against Hispanics, Asians, and Native Americans and continuing underrepresentation of these minorities among the County's Firefighters. The 1990 Census figures indicate that County's civilian labor force was approximately 3.5% Hispanic, 3.5% Asian, and 0.35% Native American. *Supra* at p. 1. By way of contrast, at the end of fiscal year 1993, the Fire Department was less than 2% Hispanic, 0.5% Asian, and 0.0% Native American. *Supra* at p. 2.

In discussing *Croson*, the Court of Appeals states:

> In that case the Supreme Court expressly said that an affirmative action program may not give benefits to minorities in general, but it must target benefits only to particular groups that were the subject of particular acts of discrimination . . . .

Alexander v. Prince George's County, Maryland, Appendix at p. A-11. What this Court actually said in *Croson* was that "[t]he *random* inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in . . . [a particular private industry in a particular political subdivision] *suggests* that *perhaps* the . . . purpose was not in fact to remedy past discrimination." *Croson*, 488 U.S. at 506 (emphasis supplied). And in *Croson* there was as well, as this Court put it, "gross overinclusiveness." *Id.*

The circumstances giving rise to the adoption of the Plan, and the implementation of that Plan over time, prove beyond dispute that the Plan was for the sole and exclusive purpose of eradicating past discrimination.

The Court of Appeals Erred In Requiring That The County, As a Prerequisite to Implementing An Affirmative Action Plan, Was Required To Waive The Volunteer Preference, Established by Ordinance

As set forth earlier, *supra* at pp. 7-8, the "volunteer preference" is the fifth of eight hiring preferences specified for Firefighters in the County's Personnel Law. It is available to all applicants for employment with the Fire Department, of any race or gender, who have served as volunteer Firefighters. It may be waived by the County Personnel Officer upon a written finding by him that its application with respect to any given Firefighter Recruit Class "will have a disparate effect on a protected class." (Appendix at p. C-7). The "volunteer preference" enables the Department to

hire the best qualified applicants. It is self-evident that experience as a volunteer is likely to be beneficial to a Firefighter Recruit, to the Department, and to the community it serves.

In *Croson*, this Court held that the City of Richmond's Minority Business Enterprise program was not narrowly tailored, in part because the City "does not appear to have [given] any consider[ation] [to] the use of race-neutral means to increase minority participation in . . . contracting" before adopting its race-based measure. This Court reasoned that because minority contracting businesses tend to be smaller and less well-established, providing race-neutral financial and technical assistance to them and relaxing bond requirements might achieve the desired remedial results in public contracting — increasing opportunities for those minority businesses. 488 U.S. at 507, 510.

In *Croson*, the Court did not specify the lengths to which governments must go in considering race-neutral measures before resorting to race-conscious action. An appeals court faced with this issue concluded that the government need not first exhaust race-neutral alternatives, but only give them serious attention. *See Coral Constr. Co. v. King County, Washington*, 941 F.2d 910, 923 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) ("while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative.").

The Fire Department not only "considered", but as set forth earlier (*supra* at p. 14) actually implemented before 1984, a number of race-neutral strategies and options. These included extensive minority recruiting efforts and complete test modifications. Only after these efforts failed did the Department implement its Affirmative Action Plan. Surely this Court's precedent does not require the Fire Department to have pursued every imaginable strategy, including those not likely to be successful, in order to establish, at length, more than ten years later, that its Plan is narrowly tailored.

Additionally, the Court of Appeals' gratuitous post-hoc finding that the "volunteer preference" should have been waived and rendered inoperative by the County Personnel Officer, is based upon an inaccurate reading of the Code and the invalid premise that only white men have "volunteer preference" and that the advantage thus given to whites is being offset by the advantage given to minorities through the Affirmative Action Plan.

Now, and increasingly so since 1984, persons of all races are knowledgeable and experienced volunteer Firefighters. For example, 7 of the 13 Recruits hired in the 1993 Class received "volunteer preference." Of those 7, 2 were minority males, 3 were white males, and 2 were white females. In the 1994 Recruit Class, 2 Recruits received "volunteer preference" — a minority male and Respondent Angela Moore, who is of course a white female. *Supra* at p. 9.

The "volunteer preference," as it should, gives a legitimate advantage to persons who have served as volunteers. Part of the governmental reason for the "volunteer preference" is to encourage persons to volunteer. It is the view of Prince George's County that the elimination, either prospective or retrospective, of the "volunteer preference" would have no appreciable impact on the racial composition of the Fire Department workforce. Although the Court of Appeals characterized the elimination of the "volunteer preference" as a "simple step" (Appendix at p. A-8), it is not one that should have been taken or would have assisted in increasing diversity in the workforce.

The Court of Appeals Erred in Analogizing This Case to Prior Fourth Circuit Cases Which Are Totally Dissimilar

The Court of Appeals supports its conclusion that the Fire Department's Affirmative Action Plan is not narrowly tailored by reference to *Podberesky v. Kirwan*, 956 F.2d 52

(4th Cir. 1992)[6]; *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207 (4th Cir. 1993), and *Maryland State Troopers Ass'n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir. 1993). *Alexander v. Prince George's County, Maryland*, Appendix at pp. A-11 through A-12. These cases lend no support to the Court's conclusions in the case at bar. *Podberesky* was a case involving the complete exclusion from consideration of whites from a public university's scholarship program. There is no exclusion of whites, or anything close to it, in the case at bar. And both *Hayes* and *Evans* are cases involving affirmative action in promotion where, as those cases make clear, the legal standards are vastly different from those in hiring cases.

The Court of Appeals Erred When It Struck Down The Entire Plan, Including Both Its Race and Gender Components

The Fire Department Plan is designed to give an appropriate preference to both minorities *and* females. The Court of Appeals analyzed the Plan only under the strict scrutiny standard and struck down the entire Plan, including both its race- and gender-based aspects. It is established law that gender-based preferences are to be subjected only to intermediate, not strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). This Court recently clarified that gender-based "official action that closes a door or denies opportunity" is subjected to a "heightened review," not "equat[ed] . . . for all purposes" to the standard of judicial scrutiny given to race- or national origin-based classifications. *United States v. Virginia*, 135 L.Ed 2d at 751 & n.6.

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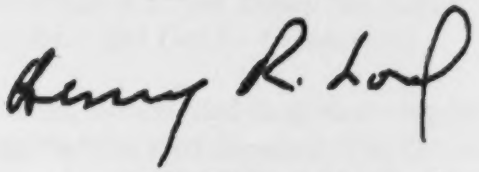
[6] The case was remanded to the District Court for fact finding to establish the required compelling interest and eventually was appealed again to the United States Court of Appeals for the Fourth Circuit. *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 2001, 131 L.Ed 2d 1002, 63 U.S.L.W. 3831 (1995).

To withstand this "heightened review," a government classification must be supported by an exceedingly persuasive justification," must serve "important governmental objectives," and must be "substantially related to the achievement of those objectives." *Id.* at 750-51 (*quoting Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The gender preferences in the Fire Department's Affirmative Action Plan are without question justified by compelling governmental interests in remedying scurrilous past discrimination and harassment against women and ensuring diversity in the workplace. Indeed, of the 72 Recruits hired from 1990 through 1994, 11 were women, one of whom was Respondent Angela Moore. *Supra* at p. 2.

CONCLUSION

Prince George's County, Maryland and its Fire Department officials respectfully request that this Honorable Court grant a Writ of Certiorari so as to clarify the effect of strict scrutiny upon governmental affirmative action plans for public-safety hiring. Further, Petitioners respectfully request that this Honorable Court declare that the decision of the United States Court of Appeals for the Fourth Circuit, concluding that the 1984 Affirmative Action Plan of the Prince George's County Fire Department was unconstitutional, is not in conformity with the applicable rulings of this Court.

Respectfully submitted,



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